No. 10695

In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HOLTVILLE ICE AND COLD STORAGE COMPANY, ASSOCIATED FARMERS OF IMPERIAL COUNTY, AND HUGH T. OSBORNE, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In our main brief, we have referred the Court to the evidence and well-established principles which in our view properly impelled the Board to find that respondents violated the Act. Accordingly, it seems unnecessary to discuss here the substantial evidentiary support for those few of the Board's factual findings which respondents openly challenge in their briefs. But respondents also make a number of misstatements in their briefs as to the record and assert several alleged defenses which either have been rejected by the courts or clearly do not apply in the situation actually disclosed by the record and found by the Board. This reply brief is submitted in order to

direct the Court's attention to, and correct, what seem to us to be the more important of these matters.[1]

1. Respondents contend (Co. Br., pp. 16–17, 24–26; A. F. Br., pp. 23–24, 30–32) that the statements made by Superintendent Pool and respondent Osborne to the Ice Company's employees were not threatening or coercive but were mere expressions of personal opinion, protected by the guaranty of "free speech" in the First Amendment of the Constitution. But the superintendent's statements to various employees that the Company's president was "sure mad" because they had joined the Union, that the Union "didn't have a chance" because the men who did the hiring were "a jump ahead of the unions," and that joining the Union was not "a very good idea" since the company could get "plenty of nonunion men" (Bd. Br., p. 8), carried on their face threats of economic reprisals for union adherence. Moreover, the threats were given substance by the Company's virtual dismissal soon thereafter of all seven employees who remained members of the Union (Bd. Br., pp. 18–19). Likewise threatening and coercive on its face was respondent Osborne's statement to employee Davis that Willard would close the plant rather than deal with the Union (Bd. Br., p. 10).[2] It is well settled that such coercive conduct is

[1] In the following discussion we shall make references to the brief of respondent Holtville Ice and Cold Storage Company as "Co. Br., p. —" and to the joint brief of respondents Associated Farmers of Imperial County and Hugh T. Osborne as "A. F. Br., p. —."

[2] Respondent Ice Company is, of course, unsound in its contention (Co. Br., p. 28) that an employer has a right to shut down his plant or to threaten to do so, in order to avoid dealing with a labor

not constitutionally protected merely because it involves the use of oral statements. E. g., *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 477; *N. L. R. B.* v. *Sunshine Mining Co.*, 110 F. (2d) 780, 786 (C. C. A. 9); *N. L. R. B.* v. *Schaefer-Hitchcock Co.*, 131 F. (2d) 1004, 1008 (C. C. A. 9); *N. L. R. B.* v. *Lettie Lee, Inc.*, 140 F. (2d) 243, 249 (C. C. A. 9).

2. Respondents assert (Co. Br., pp. 19–20, 21–22; A. F. Br., pp. 12–15) that, contrary to the Board's finding (R. 61), the Association was the result of the spontaneous action of the employees, without interference or domination by respondents. In attempting to support this position, they not only distort the record but, in several instances, misstate the testimony of the very witnesses upon whom they rely.

a. In order to demonstrate that the Association was the free choice of the employees, respondents state (Co. Br., pp. 19–20, 22; A. F. Br., p. 13) that "all" employees joined the Association. Of course, they implicitly exclude the 7 "regular" employees whose employment the Ice Company terminated, as the Board properly found (R. 67–80; and see Bd. Br. p. 17), because of their membership in the Union. In the light of the record, therefore, the substance of respondents' contention is that, after the company's

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organization which represents his employees. *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 76; *N. L. R. B.* v. *Electric Vacuum Cleaner Co., Inc.*, 315 U. S. 685, 693; *N. L. R. B.* v. *National Motor Bearing Co.*, 105 F. (2d) 652, 657–658 (C. C. A. 9); *N. L. R. B.* v. *J. G. Boswell Co.*, 136 F. (2d) 585, 590 (C. C. A. 9); *N. L. R. B.* v. *Polson Logging Co.*, 136 F. (2d) 314, 314–315 (C. C. A. 3); *N. L. R. B.* v. *Long Lake Lumber Co.*, 138 F. (2d) 363, 364 (C. C. A. 9).

sweeping dismissal, because of their union activities, of the 7 employees who were members of the Union, "all" 12 of the remaining employees (Bd. Br., note 18 at pp. 13–14) "freely chose" to become members of its rival, the Association. We respectfully suggest that no comment is necessary concerning the meritless nature of this contention. See *N. L. R. B.* v. *Link-Belt Co.,* 311 U. S. 584, 598–599.

b. Respondent Ice Company also states (Co. Br., p. 22) that the Union failed to file "any complaint of wrongdoing" until December 18, 1942, more than a year after the Association had secured its first contract with the company, during which time (it asserts) the employees were presumably content with the Association, and that "It hardly seems fair to let the union sleep on its rights, if it had any, for a period of a year and then ask the Board to penalize respondent Ice Company." But the record is clear that charges, alleging that the Association was company-dominated, were filed by the Union on January 3, 1942, slightly more than a month after the execution of the Association's first contract (R. 47, note 2; and see also the certified record filed by the Board with the clerk of the court). Indeed, respondent itself refers to the charge filed on December 18, 1942, as "the third amended charge" (Co. Br., p. 22).

c. Similarly, the Associated Farmers' brief (p. 12) at least suggests that an immediate and general revulsion for the Union on the part of the employees the day after they joined the Union, led to the formation of the Association. Thus, Associated Farmers

states that on February 27, all 10 union members "began looking around for another method to give them a union of which they were in control." There is no support in the record for this statement. Indeed, the testimony is clearly to the contrary. Only 3 of the 11 union members ever joined the Association (Bd. Br., note 24, pp. 18–19). Moreover, employee Herring, upon whose testimony respondents rely in this regard, testified that on September 27, and for a few days thereafter until Osborne visited him, the possibility of an unaffiliated union was discussed only between himself and Harlan, who was not a union member (R. 690, 693–694), that thereafter, the 3 union members to whom Herring broached the subject said that they would remain with the Union (R. 695), and that when Osborne met with some of the employees a week or so later to "help us get our union started," the meeting was attended by 8 employees, only 4 of whom had previously joined the Union (R. 695–697).[3]

d. Respondent Associated Farmers takes even greater liberties with the record when it asserts (A. F. Br., p. 14) that before Willard asked Osborne to "interest" himself in the company's labor troubles, Herring had already enlisted Osborne's aid in the formation of the Association. In support of its assertion, Associated Farmers relies upon Willard's testimony that when he saw Osborne, the latter said that he already knew all about the union activities (A. F. Br. p. 14). But the record is clear that Osborne was then referring, not to a movement for an unaffiliated

[3] Herring, Drinkard, Stout, and Fredenburg (R. 696).

association, but to the general activities of the Union in the Valley which, as they spread to the Ice Company's plant, had begun to disturb Willard (Bd. Br. pp. 8–9). And Osborne himself testified (R. 223–224), as the Board properly found (R. 57, 61), that he first "contacted" Herring and the other employees and assisted the formation of the Association *after* he had visited Willard.

3. Claiming that the employees desire to be represented by the Association, respondents contend that (Co. Br. pp. 19–23; A. F. Br. p. 21)—

> although an inside union is formed in violation of the Act, nevertheless the Board cannot order it disestablished if in fact it is the clear desire of the employees to have such an inside organization (Co. Br. p. 23).

Respondents are in error both in their premise and in their conclusion. In view of respondents' illegal assistance and support of the Association, it cannot be said that the employees' membership in the Association reflects their free choice. The Board properly found that the Association, as a dominated labor organization (R. 62, 81, 84), was an obstacle to the employees' exercise of their rights under the Act, was incapable of serving the employees as a genuine collective bargaining agency, and should, therefore, be disestablished in order to effectuate the policies of the Act (R. 62, 81, 93). The Supreme Court and this Court have recognized the power of the Board upon the basis of such findings to order the disestablishment of an illegal labor organization even though it appears

to be accepted by the employees as their agent. *N. L. R. B.* v. *Newport News Shipbuilding and Dry Dock Co.,* 308 U. S. 241, 248–250; *N. L. R. B.* v. *Southern Bell Telephone & Telegraph Co.,* 319 U. S. 50, 60; *N. L. R. B.* v. *Idaho Refining Co.,* 14 L. R. R. 573, 574 (C. C. A. 9), decided June 22, 1944. See also *N. L. R. B.* v. *Falk Corp.,* 308 U. S. 453, 459–462. We know of no outstanding decisions to the contrary; *N. L. R. B.* v. *Automotive Maintenance Machinery Co.,* 116 F. (2d) 350 (C. C. A. 7), upon which respondents rely (Co. Br., p. 22, A. F. Br., p. 21), was reversed by the Supreme Court (315 U. S. 282).

4. Respondent Ice Company asserts (Br. p. 29) that Pool, Blankenship, Fredenburg, and Standifer did not apply for reinstatement after their seasonal lay-off and that the Company's failure to recall them to work did not violate the Act. But the record shows, as the Board found (R. 69, 77, 78, 76) upon substantial evidence (Bd. Br., p. 23–24), that the Company *discharged* Pool, and that Blankenship, Fredenburg, and Standifer did, in fact, apply for reinstatement. Moreover, Willard and Standifer testified (R. 452–453, 520, 399) that "regular" employees, such as the men involved herein were, were customarily not required to apply for reemployment each succeeding season, but were sent notice to report for work as needed by the Company. Under the circumstances, the Company's departure from its custom, with respect to the recall of these employees, amounted to a refusal of continued employment and, when motivated by the employees' union membership and activities as the Board here

found, constituted discrimination forbidden by the Act. See *Marlin-Rockwell Corporation* v. *N. L. R. B.*, 133 F. (2d) 258, 260 (C. C. A. 2).

Respectfully submitted.

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